BEFORE ARBITRATOR MICHAEL ANTHONY MARR

STATE OF HAWAII

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| In the Matter of the Arbitration Between<br><br>HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO,<br><br>Union,<br><br>and<br><br>STATE OF HAWAII, DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, Hawaii Public Broadcasting Authority,<br><br>Employer. | Grievant: MICHAEL HOOGERWERF<br>Administrative Services Assistant BU (13), Articles 3, 4, and 9<br><br>DECISION AND AWARD |

**DECISION AND AWARD**

The above-referenced matter came before this Arbitrator, after his mutual selection by the parties, for hearing on May 12, 13, and 14, 1998. See Transcript of Arbitration Hearing dated May 12, 13, and 14, 1998. (ATr.@) Both parties were zealously and competently represented by counsel at the Arbitration hearing. The Hawaii Government Employee Association, AFSCME, Local 152, AFL-CIO, and Michael Hoogerwerf, (hereinafter AUnion@ and AGrievant@ respectively) were both represented by Peter Liholiho Trask, Esq. Employer State of Hawaii, Department of Commerce and Consumer Affairs, Hawaii Public Broadcasting Authority (hereinafter AEmployer@) was represented by Deputy Attorney General Kris N. Nakagawa. Testimony from seven (7) witnesses was received at the Arbitration hearing. The Union introduced thirty-eight (38) exhibits into evidence and the Employer introduced twenty-three (23) exhibits into

evidence. Also received into evidence were nine (9) joint exhibits. Both counsel submitted convincing closing briefs in support of their respective positions to this Arbitrator on the agreed upon due date of August 28, 1998. The agreed upon due date for this Arbitrator=s decision was October 7, 1998.

**I. <u>Concise Statement of Employer=s Position</u>**. The Employer contends that pursuant to Chapters 76 and 89 of the Hawaii Revised Statutes, the Employer may relieve an employee of his duties for lack of funds, lack of work, or other legitimate reasons. This process is referred to as a reduction-in-force. (Tr. 5/12/98, at 34).

The Employer also asserts that pursuant to Section 89-9 (d) of the HRS, the decision to implement a reduction-in-force (ARIF@) is not negotiable. However, the Employer acknowledges that the procedures for implementing a RIF were negotiated and appear in various collective bargaining agreements. (Tr. 5/12/98, at 35). These procedures are published in Article 9 of the Unit 13 bargaining agreement. (JE 1).

The Employer further asserts that it has fully complied with the contractual reduction-in-force procedures and that Grievant was properly terminated under Article 9, Reduction-In-Force, of the Unit 13 collective bargaining agreement due to a Alack of funds@. (Tr. 5/12/98, at 35).

Lastly, the Employer asserts that it did not abuse it=s discretion in implementing the RIF due to a lack of funds. (Tr. 5/12/98, at 38). To substantiate this claim, the Employer asserts that is has been suffering from a severe financial crisis dating back to 1996. (Tr. 5/12/98, at 38).

**II. <u>Concise Statement of the Position of Union and Grievant</u>**. The Union and Grievant contend that Grievant=s termination cannot be sustained under the totality of

circumstances of this case. (Union=s closing brief at page 17). The Union and Grievant cite the following allegations to support this conclusion:

1. The Employer=s termination of Grievant was pretextual, particularly since the Employer, simultaneously with Grievant=s termination, was seeking to fill two (2) vacancies within the HPBA. (Tr. 5/12/98, at 32).

2. The Employer has been unable to justify the termination of Grievant due to a lack of funds on April 9, 1997, because the Employer=s own records indicate that funds for Grievant=s position were available until June 30, 1997. (Tr. 5/12/98, at 33).

3. The Union and Grievant contend that the Employer=s RIF due to a lack of funds to terminate Grievant on April 29, 1997, one day before he was to become a regular employee, is an improper use a RIF due to lack of funds. (Union=s closing brief at pages 15 and 16).

4. The Union and Grievant further contend that the Employer=s use of a RIF to stop Grievant from obtaining RIF rights and benefits is an improper use the a RIF due to lack of funds (Union=s closing brief at 15 and 16; Tr. 5/12/98, at 34).

5. Lastly, the Union and Grievant assert that the termination of Grievant was pretextual because of the Employer=s personal dislike for the Grievant and that the Employer=s actions were unreasonable, arbitrary, and capricious. (Union=s closing brief at 16 and 17; Tr. 5/12/98, at 33 and 34).

**III. <u>RELEVANT FACTS</u>** On May 6, 1996, the Employer sent a memorandum to Governor Benjamin J. Cayetano requesting permission to fill the position of Administrative Services Assistant, Position #29782. Evidently, the incumbent in this position transferred to the Department of Public Safety, effective May 1, 1996. (UE 24). This position was a

Avery critical position@ to the HPBA and it was Aimperative@ that the position be filled Aas soon as possible.[1]@ (UE 24).

By letter dated August 12, 1996, Employer=s request to fill position 29782 was approved by Charles Toguchi, acting on behalf of Governor Benjamin J. Cayetano. (UE 24). In addition, to approving the funding for position 29782, HPBA was advised that it may have a shortfall of about $169,835 and that it must identify general fund positions, starting with any existing vacant general positions, for deletion in order to rectify the shortfall. (UE 24) (underscoring provided).

As an eligible on the recall list, Grievant was given priority for referral to vacant Administrative Services Assistant positions pursuant to Article 9 (Reduction-in-Force) of the Unit 13 Collective Bargaining Agreement. (JE 1). The Unit 13 Agreement provides that a single recall eligible is referred to a vacancy based on the eligible=s ranking or number of retention points. (JE 1;

JE 9). The recall eligible is interviewed and may refuse the position or the employing program may

[1] This letter, dated May 6, 1996, was written by Ms. Kei Yamamoto (Tr. 5/13/98, at 239-240) for Kathryn S. Matayoshi, Director of Commerce and Consumer Affairs, and was sent to Governor Benjamin J. Cayetano. It provides in relevant part as follows: PURPOSE AND NEED OF THE REQUEST. The incumbent in this position transferred to the Department of Public Safety effective May 1, 1996, thus creating a vacancy in a very critical position to HPBA...2 CONSEQUENCES OF NOT FILLING THE POSITION. If this critical position is not filled the following will result: The Administrative Services Assistant (ASA) handles all confidential matters dealing with personnel. This position is the hub of HPBA=s network. During 1994 this position was vacant for six months during which time a clerk typist (who was subsequently a victim of the RIF) tried to fill in along with a lot of help from DCCA=s personnel section. That experience taught us that without this position, HPBA=s personnel section missed deadlines and quality of work fell to an all time low. The morale of HPBA=s staff was beginning to affect their ability to perform daily functions because confidential issues weren=t handled timely and professionally. .. It is imperative that we fill this position as soon as possible. We presently have one full time staff person working a half a day on processing routine personnel paperwork.

not appoint the recall eligible for good cause. (JE 1). See full text of Article 9 as set forth below.

Grievant subsequently filled the HPBA Administrative Services Assistant (Position No. 29782) and became an employee of the State of Hawaii, Department of Commerce and Consumer Affairs (ADCCA@), Hawaii Public Broadcasting Authority. He was hired as an initial probationary employee from the Administrative Services Assistant recall list[2] and was assigned at all relevant times herein to Hawaii Public Television in Honolulu. Effective date of hire was November 1, 1996, and Grievant had an initial probationary period of 6 months. (Tr. 5/14/98 at 909; UE 18).

When Grievant first began his employment at HPBA he received positive comments on his work performance. On November 22, 1996, Grievant began to receive feedback that disturbed him. He received an E-mail (UE 34) from Ms. Karen K. Yamamoto that required him to prepare reports that he had never had to do in a management position before[3]. (Tr. 5/14/98, at 921).

The relationship between Grievant and his supervisor, Ms. Karen K. Yamamoto evidently began to worsen. In an E-mail (UE 35) from Ms.Yamamoto to Grievant, dated November 26, 1996, Grievant=s judgment was placed in issue[4] regarding AOpening Doors for Staff.@ Grievant

[2] Grievant, prior to his employment with the HPBA, was employed with the State of Hawaii, State Foundation on Culture and the Arts, from January 3, 1994 through October 16, 1995. He was later terminated due to a RIF in 1995 and placed on a recall list. (Tr. 5/14/98, at 908-909).

[3] The E-mail provides in relevant part as follows: [i]nstead of reporting in the same cycle that the Branch Chiefs report to Don, I would like you to submit to me a weekly report on every Friday beginning today. This report should detail what you have accomplished during the week and your immediate goals for the following week. I do not want a narrative, rather use a bullet point style for this report. I would like you to speed up your time table on getting the inventory reconciled and start your testing of the inventory on the books. I would like to see a list of additions and deletions since the fiscal year began and a monthly update. The first report will be due next week Friday and the updates due at the end of every month thereafter. Your report on the testing of inventory should be included within your weekly reports. I need to make some assessments regarding the Administrative Branch within the next several months and need some input from you in regards to staffing. Your reports will help me make key decisions in this area.

[4] The E-mail provides in relevant part as follows: [a] situation arose this morning where Jennifer Thomas needed to get into the Premium room and the only two people that we knew of with keys were Jerri (on vacation) and Candy (not in the building). She requested that I open Jerri=s

maintains that he never opened a door for anyone and does not know what Ms. Yamamoto was referring to in UE 35.

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office door so she can get the key from Jerri=s desk. I called Ed Robello (Jerri=s good friend) and he said he would take care of it. DO NOT OPEN CHIEF=S DOORS FOR STAFF UNLESS YOU FEEL IT WAS REALLY URGENT AND THERE WAS NO ALTERNATIVE. KAREN IKOMA IS ALLOWED TO OPEN ADMIN DOORS TO DROP OFF PAPERWORK. KAI IS ALLOWED TO ASK KAREN TO OPEN MY DOOR IF SHE NEEDS SOMETHING FROM THE FOUNDATION FILE. OUR OFFICES ARE LOCKED AND PRIVATE. I would not have let Jennifer into Jerri=s office to rifle through her desk looking for keys that may or may not be there. There are a few staff members, Jennifer being one, that is always asking people to open doors for them, or asking to borrow phones to do long distance surveys, or borrow offices for one reason or another. Do not get confused between good customer service and good judgment. (underscoring provided).

Evidently, Ms. Karen K. Yamamoto, **in her own words**, began to treat Grievant Alike a child.@ She evidently apologized for her conduct (UE 36) in an E-mail[5] to Grievant, dated December 3, 1996 regarding Ameetings@. (Tr. 5/14/98, at 927).

The following day, December 4, 1996, Grievant received another E-mail from Ms. Karen K. Yamamoto, re: Meetings. The E-mail (UE 29) addressed an allegation that a fellow employee was reading other people=s E-mail. This concerned the Grievant. Evidently, E-mail is not confidential at the HPBA and can be reviewed by other employees. (Tr. 5/14/98, at 933-934).

In early December of 1996, there was apparently considerable concern over a misplaced personnel transaction register. (Tr. 5/12/98, at 291-295, 935- 942). Evidently, the misplaced PTR belonged to Ms. Karen K. Yamamoto and she was Aa little upset@ about it being misplaced. (Tr. 5/13/98, at 291). The Grievant was evidently responsible for the misplaced PTR. As a result of it being misplaced, Ms.Yamamoto E-mailed[6] Grievant on December 12, 1996, regarding A[q]uality of work@. In short, she indicated that she was concerned that Grievant stated that he could Abull-shit@ with the best, that she may be a recipient, and that his supervisory skills were in question.

On December 13, 1996, Grievant hand delivered a grievance to Mr. Sheldon E.

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[5] I didn=t mean to treat you like a child when I asked you to let me know your schedule. Don was on the war path the other day when Paul didn't know where Dean was. This has happened with other staff. In general if you just let me know that this week if you=re away from your desk you=ll be meeting with the Branch chiefs on the new project is enough. Be careful when you conduct your interviews, you=ll be pumped for information and it will somehow manage to get back to Don with negative undertones. This is what happened to Colleen and that is one reason Don was not pleased when she called for her job back. And before he got that information, he really wanted her back. Remind me tomorrow and I=ll tell you the story. (underscoring provided)

[6] We should meet sometime tomorrow afternoon regarding your quality of work. I am disappointed in your performance. Yesterday when Lynn found my completed PTR in the stack of blank PTR=s I thought somehow a copy was misplaced. To later discover that it was the original after you assured me that you checked all out-going PTR=s against your stall list, I was speechless. Your continual comments of how you can bull-shit with the best has me concerned as to whether I am a recipient. This is not a quality I admire in my staff. Your supervisory skills are also questionable for someone with your experience. (underscoring provided).

Robbs, Executive Director, Hawaii Public Broadcasting Authority.[7] In addition, Mr. Robbs met with both Ms. Karen K. Yamamoto and Grievant. Mr. Robbs attempted to Amediate their ongoing personality clash.@ (Tr. 5/12/98, at 121). According to Ms. Yamamoto, Mr. Robbs was Aupset@ with **both** her and Grievant. (Tr. 5/13/98, at 314-315). Grievant reported that Mr. Robbs informed him at this meeting that he viewed their situation as a Aconflict between two very strong professionals@ and that they should attempt to work matters out. (Tr. 5/14/98, at 943). Mr. Robbs also informed Grievant that if Ms. Yamamoto wanted to terminate him for whatever reason, he would back her up because she was his right hand. (Tr. 5/14/98, at 944).

On January 21, 1997, Governor Benjamin J. Cayetano addressed the Joint Session of the Nineteenth Hawaii State Legislature in his State of the State address. In his address, the Governor stated as follows:

> First we put our fiscal hours in order. Under our financial plan, there is no need for layoffs or furloughs. Moreover, our plan provides enough funding for modest tax relief for our people and modest pay raises for our state workers. (underscoring added) (UE 1).

[7] The grievance provides in relevant part as follows: Spirit of Unbiased Performance Appraisal Espoused in the Performance Appraisal System Supervisors Manual published in March of 1996. 1. That negative comments have been sent to me over electronic mail violating my right to privacy when being disciplined...It is my belief that a rush to judgment concerning my abilities was made and that expected performance levels were predetermined prior to my arrival... The conversation touched on the fact that I can be released from employment at the end of a six month probationary period should my performance be substandard and a real close evaluation of everything I do was necessary because once I become permanent, HPBA would be stuck with me. To date, I have not met with my supervisor to establish performance goals as required by the State of Hawaii Performance Appraisal System and I have not been counseled as to any shortcomings. To the contrary, I have not been counseled as to any shortcomings. Still, during my December 12, 1996 meeting with my supervisor on December 12, 1996, I was told... well, you really look good on paper, but... It is my belief whatever I do at HPBA will be rated as Fails to Meet Expectations. Remedy: 1. That my period of probation be waived and that I be granted permanent status. 2. That I be assigned to another manager for performance evaluation purposes who has not been privy to the prejudicial information that could taint their day to day evaluation of my performance.

A Honolulu Advertiser news article written by William Kresnak, Advertiser Staff Writer, in reporting on the 1997 Legislature indicated that Carol Fukunaga, a co-chairperson for the Senate Ways and Means committee, stated that state workers won=t be laid off under the final version of the budget, although many vacant positions will be eliminated. (UE 2). This article supports Governor Benjamin J. Cayetano=s statements to the Joint Session of the Nineteenth Hawaii State Legislature on January 21, 1997. (UE 1).

On March 10, 1997, HPBA published a notice that it was accepting applications to fill the vacant, exempt, HPB Assistant Chief Engineer position. (UE 3). And on April 24, 1997, HPBA published a notice of accepting applications to fill the vacant, exempt, HPB Television Broadcast Engineer I position. (Tr. 5/12/98, at 103).

From December, 1996 through February of 1997, Grievant was routinely required to act as a receptionist. (Tr. 5/14/98, at 951). In addition, Ms. Karen K. Yamamoto, omitted him from board meetings and left him out of decisions regarding his staff and student aides. (Tr. 5/14/98, at 947).

In early March 1997, Ms. Karen K. Yamamoto consulted with DCCA=s Departmental Personnel Officer, Mr. Patrick Chen, on RIF procedures. (Tr. 5/13/98, at 409). Shortly thereafter, Mr. Chen conferred with the DCCA=s Director, Ms. Kathryn S. Matayoshi, on RIF procedures at a meeting with HPBA=s General Manager, Mr. Sheldon Robbs. (Tr. 5/13/98, at 418). On March 17, 1997, following Ms. Matayoshi=s directive to implement the RIF (Tr. 5/13/98, at 422), Mr. Chen consulted with the Union through Ms. Nora Nomura, the Union=s business Agent, concerning the RIF and identified the employee, class, and position number affected.

On March 25, 1997, the Employer informed the Union that the Grievant would soon be subjected to a layoff due to lack of funds effective the close of the business day on June 30, 1997 in accordance with Article 9 of the unit 13 collective Bargaining Agreement. (ER 1).

On March 31, 1997, the Employer provided the Grievant with a 90 day notice of the impending RIF, the Grievant=s layoff date, and his RIF rights. (ER 2; UE 5). However, on April 10,

1997, the Department of Human Resources Development (ADHRD@) determined that the Grievant was a non-regular employee and not entitled to a 90 notice of RIF placement rights. (ER 3; UE 7). DHRD notified DCCA by memorandum[8] with a copy to the Union of DCCA=s error and Ainstructed@ DCCA to immediately rescind the March 31, 1997 RIF notification and inform Grievant of a new termination date based on DCCA=s Afunding and program needs@. (ER 3; UE 7).

On April 14, 1997, DCCA issued a rescission of the March 31, 1997 notice explaining to the Grievant and the Union of its inadvertent error in affording the Grievant RIF notice and placement rights. (ER 4; UE 8). DCCA informed the Grievant that he would be laid off Adue to lack of funds@ effective the close of business on April 29, 1997. (ER 4; UE 7).

Grievant had commenced his initial probationary appointment for position 29782 on November 1, 1996. (JE 2; UE 18). Grievant was laid off at the close of business on April 29, 1997,

[8] The April 10, 1997 DHRD memorandum provided in relevant part as follows: [b]ased upon our careful review, however, we found that Mr. Hoogerwerf is currently a non-regular employee serving an initial probationary appointment. Consequently, Mr. Hoogerwerf is not entitled to RIF placement rights under the BU 13 contract provisions, and the Reduction In Force Guidelines we issued on July 31 1995... Because of the foregoing reasons, we are instructing you to immediately rescind your 90-day initial RIF notification letter March 31, 1997 to Mr. Hoogerwerf and advise him of the error made. Instead, you should determine and inform Mr. Hoogerwerf of a new termination date **based on your funding and program needs**. Please be advised, however, that if you fail to notify Mr. Hoogerwerf of the department=s error in issuing the 90-day initial RIF notification letter prior to the date he is currently scheduled to complete his initial probationary period, i.e., April 30, 1997, then he will be entitled to all RIF rights and benefits accorded to a regular civil service employee as provided by the BU 13 contract. (ER 3; UE 7) (emphasis and underscoring provided)

allegedly due to lack of funds, which was prior to the end of his six month probationary period. (Tr. 5/13/98 at 451; ER 4). Coincidentally, April 29, 1997 was **one day** before Grievant=s probationary period would have ended. (Tr. 5/13/98, at 498). If Grievant were terminated at the close of the business of April 30, 1997, he would have attained the status of a regular employee and would be entitled to RIF rights. (Tr. 5/13/98, at 498).

On April 28, 1997, Grievant provided a second step one grievance (UE 10) to Mr. Sheldon Robbs.[9] (Tr. 5/14/98, at 959). Grievant believed that Ms. Karen K. Yamamoto was eliminating his position for a reason other than Alack of funds.@

On May 12, 1997, the Union filed a grievance on behalf of Grievant at Step 2 alleging violation of Articles 3, Maintenance and Rights and Benefits; 4, Personnel Policy Changes; and 9, Reduction-In-Force. The remedy sought was rescission of Grievant=s termination and placement in another comparable position within the State system. (JE 2; UE 11). DCCA issued a Step 2 reply on June 6, 1997 denying the remedies sought. (JE 3; UE 12).

The Union filed a Step 3 appeal on June 16, 1997. (JE 4; UE 13). A step 3 response from DHRD was issued on July 14, 1997 denying the remedies sought. (JE 5; UE 14).

The Union=s notice of intent to arbitrate the above-stated grievance was issued on

[9] This grievance provides in relevant part as follows: Improper E-Mail being sent over stations-Mail system. b. No corrective action in response to complaints of harassment and unfair treatment which were directed to Don Robbs on December 13, 1997... (3) Being excluded from personnel related meetings that I should have been involved in. (4) Being required to assume positions below my stature and outside of my job description (receptionist). (5) Being the only person in the station required to submit a detailed report of work accomplished for the current week and future work plans. (6) Having locks on my office changed without my knowledge. (7) Having all of my responsibilities publicly removed (E-mail) several days prior to being notified of change in termination date and lying about the reasons. d. Manipulation of personnel regulations and policies in an attempt to separate me from my position without cause. (1) Using a RIF action as justification of eliminating my position due to budget reductions while recruiting for several general fund positions. (2) Changing my termination date to April 29, 1997 (1 day prior to end of probation) in rather than allowing me to complete my probationary period and have the opportunity to bump on performance...It is obvious to me... I had no chance of completing my probationary period... During December I was told that the only reason I was hired was because there was no other choice...(2) No January 31, 1997 performance evaluation. (3) No feedback what-so-ever one of several reasons for the conversation with Donn Robbs on December 13, 1997... Using the excuse of a nonexistent RIF to remove me from my position...

July 24, 1997. (JE 6).

**IV. <u>Relevant Contract Provisions</u>** The relevant sections of the Unit 13 Collective Bargaining Agreement involved in this grievance and arbitration are Articles 3, 4, 5 and 9. The relevant sections are set forth below:

ARTICLE 3 - MAINTENANCE OF RIGHTS AND BENEFITS

Except as modified herein, Employees shall retain all rights and benefits pertaining to their conditions of employment as contained in the departmental and civil service rules and regulations and statutes at the time of execution of this Agreement, but excluding matters which are not negotiable under Chapter 89, HRS.

ARTICLE 4 - PERSONNEL POLICY CHANGES

A. All matters affecting Employee relations, including those that are, or may be, the subject of a regulation promulgated by the Employer or any Personnel Director, are subject to consultation with the Union. The Employer shall consult the Union prior to effecting changes in any major policy affecting Employee relations.

B. No changes in wages, hours or other conditions of work contained herein may be made except by mutual consent

ARTICLE 5 - RIGHTS OF EMPLOYER

The Employer reserves and retains, solely and exclusively, all management rights, powers, and authority, including the right of management to manage, control, and direct its work forces and operations except as may be modified under this Agreement.

ARTICLE 9 - REDUCTION IN FORCE

A. All personnel actions under this Article shall be restricted to members and positions of this bargaining unit and shall be confined to the governmental jurisdiction in which the reduction-in-force occurs.

B. When there is an impending reduction-in-force because of lack of work or funds, the appointing authority shall inform the respective Central Personnel Agency and the Union, in writing, as soon as possible but in any case at least ninety (90) calendar days before the impending reduction-in-force will take place.

C. The Employer shall consult with the Union on the Employer=s plans for the reduction-in-force.

D. Waiver of Bumping Rights. The Employee affected by the reduction-in-force may waive the

Employee=s bumping rights, in writing to the Central Personnel Agency, thereby limiting the Employee=s placement to vacant positions.

E. Retention Points for Regular Employees. In the event of a reduction-in-force, the displacement or termination of services of an Employee shall be based on the Employee=s total continuous creditable service within the Employee=s applicable governmental jurisdiction including the combined service time and classes of Employees whose functions are transferred from one jurisdiction to another through action of the legislature. Creditable service shall be restored to Employees who are rehired from the recall list established in paragraph AI@ below. Retention points shall be computed on the basis of one (1) point for each full month of employment in the applicable jurisdiction, including service in another jurisdiction prior to any transfer of the Employee=s position to the applicable jurisdiction through legislative action. A fraction of a month of service shall be used to break Aties.@ Retention points shall be computed up to the day on which the work or funds terminate.

Creditable service for purposes of computing retention points shall include all authorized non-disciplinary leaves of absence, however, suspensions (including unauthorized leave charged in lieu of suspension) shall not constitute a beak in continuous service.

F. Conditions of Placement of Regular Employees.

1. The Employee must meet the minimum qualification requirements of the class of the position in which the Employee is to be placed.

2. The Employee is a regular Employee of the jurisdiction.

3. The Employee shall have priority for placement in the vacant position to which the Employee is referred under the provisions of this Article.

4. The Employee shall be referred for placement in a position on the basis of the Employee=s indication of the geographic location(s) (island and district) where the Employee is willing to be placed; the minimum pay range, not higher than that of the Employee=s present position, that the Employee will accept; and the type of appointment, regular and/or non-regular, that the Employee will accept. The appointing authority shall provide the Union with a listing of all vacant positions which meet the conditions under which the Employee has indicated the Employee would be willing to accept.

5. The Employee shall be entitled to only one referral for placement in a position which is in accordance with the terms the Employee specified as provided for in (4) above. If the Employee should fail to accept the offer of employment in the position, the Employee=s services shall be terminated on the abolishment date of the position or termination of funds or work, or the date of the Employee=s displacement, and the Employee=s name shall be placed on the recall list.

G. Bumping Procedures for Regular Employees within the Employing Department.
If the Employee cannot be placed in a vacant position, a reduction-in-force will be effectuated. In the order of utilization outline below, the appointing authority shall provide the Union with a list of all positions and their classification, the incumbents= names, and the incumbents= retention points. Subject to the conditions set forth in (F) above, the following order shall be observed in bumping and layoff of Employees:

1. Non-regular employee who occupies a permanent position in the same class when there is more than one such Employee, in the following order: first, an Employee serving an emergency appointment; second temporary appointment outside the list; third, provisional appointment Employee; fourth, a limited-term, appointment Employee; and fifth, a probational appointment Employee.

2. Regular Employee who occupies a position in the same Class and has the least retention points.

3. Non-regular Employee who occupies a permanent position in a related class of the same pay range. When there is more than one (1) such Employee, the order of bumping will be as provided in (1) above.

4. Regular Employee who occupies a position in a related class of the same pay range and has the least retention points.

5. Non-regular Employee who occupies a permanent position in a class of a lower pay range in the same series. Where there is more than one (1) such Employee, the order of bumping will be as provided in (1) above.

6. Regular Employee who occupies a position in a class of a lower pay range in the same series and has the least retention points.

7. Non-regular Employee who occupies a permanent position in a class of a lower pay range in a related series. Where there is more than one (1) such Employee, the order of bumping will be as provided in (1) above.

8. Regular Employee who occupies a position in a class of a lower pay range in a related series and has the least retention points.

When the Employee cannot be placed in another permanent position, the same order of bumping may be repeated for temporary positions prior to layoff. In the event that a regular Civil Service Employee has less than twenty-four (24) retention points and cannot be placed in the Employee=s department, the appointing authority shall notify the affected Employee, the Union and the Central Personnel Agency in writing at least sixty (60) calendar days prior to the layoff. The appointing authority shall also notify the Central Personnel Agency in writing that a jurisdiction-wide reduction-in-force needs to be

effectuated provided that the Employee has at least twenty-four (24) retention points and is a regular Civil Service Employee.

H. Jurisdiction-wide Reduction-in-Force for Regular Employees. A jurisdiction-wide reduction-in-force action will be effectuated only for a regular Civil Service Employee who has not been referred for placement or cannot be placed in an appropriate position within the employing department and if the Employee has regular or permanent Civil Service status with the jurisdiction with at least twenty-four (24) retention points. A regular Employee with less than twenty-four (24) retention points will have retention rights only within the department in which the Employee is employed. The Employee affected by reduction-in-force shall be referred for placement in another position on the basis of Section F, Conditions for Placement of Regular Employees. In a jurisdiction-wide reduction-in-force action, the order used shall be in accordance with Section G, Bumping Procedures for Regular Employees within the Employing Department. The Employer shall furnish the Union with the information similar to the information requirements of Sections F and G. When a regular Employee cannot be placed in another position, the Central Personnel Agency shall notify the Employee and the Union, at least sixty (60) calendar days prior to the date of the Employee=s services will terminated, and the Employee=s name will be placed on the appropriate recall list.

I. Placement of Laid Off Regular Employees on the Recall List. A regular Employee who has been laid off shall have the Employee=s name placed on the recall list for the class of work from which the Employee=s services were terminated and any related class at the same salary range for which the Employee meets the minimum qualification requirements provided there is no recall list for such related class. The Employee=s eligibility may be terminated for any of the following reasons:

1. The eligible is no longer able to perform satisfactorily the duties of the class of work.

2. The eligible is appointed to a permanent position.

3. The eligible refused two (2) offers of employment under the conditions that the eligible had previously indicated the eligible would accept.

4. The eligible fails to respond without good cause within ten (10) days to a written inquiry sent to the last address the eligible provided.

5. The eligible is no longer available for employment.

6. The eligible fails to report to duty after the eligible=s appointment, without good cause, within the time prescribed by the appointing authority.

A laid off Employee=s eligibility may be terminated for other valid reasons provided that if such an Employee=s eligibility is so terminated, the Employee shall have the right to challenge the validity in accordance with the provisions of Article 11, Grievance Procedure.

J. Rank on the Recall List. Employees shall be ranked on the appropriate recall list and shall be

certified to vacancies on the basis of retention points. The Employee with the highest retention points shall be ranked number 1, the next higher, number 2, etc.

K. Laid off Employees on the recall list shall be given first preference in the selection for vacancies over any other eligible list. The laid off Employee with the highest retention points from the appropriate recall list shall be certified first. Certification of the next highest laid off Employee and subsequent eligibles shall be made only upon the refusal of the position by the higher laid off Employee and should such laid off Employee not be appointed for good cause.

L. The Employer upon request of the Union shall provide the Union, once annually, with copies of current recall lists showing the names of the regular Employees laid off, the departments in which they were last employed, and their total creditable service at the time of their layoff.

M. The time limits for notices contained herein shall not apply to those situations, such as the elimination of a Federally funded position, where the Employer had insufficient knowledge of such layoff to meet the time requirements.

## V. Arbitrability Objection

The Employer argued in it=s closing brief that the Union for the Afirst time@ alleged that the reduction-in-force was implemented because the Employer Adidn=t like [the Grievant]... or did not want [the Grievant] to obtain the rights under the Unit 13 Collective Bargaining Agreement. (Tr. 5/12/98, at 34). The Employer further asserted that this Anew@ allegation lacks arbitrability. The employer noted that Article 11 of the collective bargaining agreement states in relevant part as follows:

> If the Employer disputes the arbitrability of any grievance, the Arbitrator shall first determine whether the Arbitrator [sic] has jurisdiction to act; and if the Arbitrator [sic] finds that the Arbitrator [sic] has no such power, the grievance shall be referred back to the parties without decision or recommendation on its merits. (JE 1).
>
> * * *
>
> There shall be no appeal from the Arbitrator=s decision by either party, if such decision is within the scope of the

Arbitrator=s authority as described below:

> 1. The Arbitrator shall not have the power to add to, subtract from, disregard, alter, or modify the terms of this Agreement.
>
> 2. The Arbitrator=s power shall be limited to deciding whether the Employer has violated any terms of this Agreement.
>
> 3. The Arbitrator shall not consider any allegations or charges other than those presented at Step 3. JE 1 (underscoring provided).

The facts of this case indicate that this Arbitrator has jurisdiction to act on issues of discipline and compliance with RIF procedures, particularly if the RIF was improperly used. These issues are arbitrable. The Hawaii Revised Statutes, Section 89-9 (d) provides in relevant part as follows:

> ... provided that the employer and the exclusive representative may negotiate procedures governing the promotion and transfer of employees to positions within a bargaining unit, procedures governing the suspension, demotion, discharge or other disciplinary actions taken against employees, and **procedures governing the layoff of employees; provided further that violations of the procedures so negotiated may be the subject of a grievance process agreed to by the employer and the exclusive representative**.

This provision clearly indicates that the legislature intended that procedures regarding Alayoffs@ are arbitrable. In addition, the Apeculiar and unique factual pattern@ of the case before this arbitrator clearly indicates the need for arbitrability of Grievant=s layoff. See Decision No. 370, In Hawaii Government Employees Association, AFSCME Local 152, AFL-CIO, 5 HPERB 531, (1995), Appeal withdrawn May 8, 1996, DOE v. HGEA, et. al., Civil No. 95-4142-11. (Discussed in detail below).

In regard to the issue as to whether this Arbitrator may consider the allegations that Grievant was terminated because the Employer disliked the Grievant or did not want the Grievant to

obtain RIF rights under the Unit 13 Collective Bargaining Agreement, it appears from the record that these allegations were brought up at the Step 3 level.

It is very significant to note that an Arbitrator should only consider what has been admitted into evidence and made part of the record for his consideration. If arguments are not part of the record, (exhibits entered into evidence or admissible verbal testimony) the arguments should not be considered by an Arbitrator. See In the Matter of Arbitration Between Carrol and Travis, 81 Haw. App. 264, 915 P.2d 1365 (1996); Stewart v. Smith 4 Haw. App. 185, 662 P.2d 1121 (1983); McAulton v. Smart, 54 Haw. 488, 510 P.2d 93 (462).

The record indicates that the parties stipulated that all prior steps of the grievance process had been met or waived. (Tr. 5/12/98, at 29). In addition, the parties stipulated to the arbitrability of the whether the Employer properly exercised discretion to implement a reduction-in-force due to lack of funds in accordance with Article 9 of the Collective Bargaining Agreement. (Tr. 5/12/98, at 30). This Arbitrator was not made aware, with the exception of materials admitted into evidence, as to what was contested at the Step 3 level. (JE 4; JE 5; UE 27; UE 10). It is now argued by the Employer that this Arbitrator should not consider the issue of conflict between Grievant, his immediate supervisor, and the head of the HPBA (i.e. real reason for termination was disciplinary) because it was not brought up at Step 3. However, there is nothing in the record of 3 days of testimony to indicate this issue was not part of what was negotiated at the Step 3 level and considerable evidence that this issue was negotiated at Step 3.

In Perry v. Planning Commission of Hawaii County, 62 Haw. 666, 619 P.2nd 95 (1980), the court stated at page 685 of it=s decision as follows:

> Modern judicial pleading has been characterized as Asimplified notice pleading.@ It=s function is to give opposing parties Afair notice of what the... claim is and the grounds upon which it rests...[t]hat the same if not more

> lenient standard, also governs administrative pleadings is indisputable...[t]hese need not be drawn with the refinements and subtleties of pleadings before a court... Federal courts tend to follow an even less formal approach in administrative pleadings. In Aloha Airlines, Inc. V. Civil Aeronautics Board, 598 F. 2nd 250 (D.C. Circuit 1979) the courts opinion was that: Pleadings in administrative proceedings are not judged by the standards applied to an indictment at common law. It is sufficient if the respondent Aunderstood the issue@ and was afforded full opportunity@ to justify its conduct during the course of the litigation... Thus, the question on review is not the adequacy of the... pleading, but is the fairness of the whole procedure... (underscoring provided).

Pleadings must be construed liberally and not technically. See Island Holidays, Inc., v. Fitzgerald, 58, Haw. 552, 574 P.2nd 884 (1978).

The letter to Mr. James H. Takushi, Director of the State of Hawaii Department of Human Resources Development, from Ms. Nora A. Nomura, dated June 16, 1997, is the Union=s step 3 appeal (JE 4) and for all practical purposes constitutes a Apleading@ for step 3 purposes. It clearly indicates that the Union and Grievant were concerned that Grievant=s termination was due to some other reason other than lack of funds. The Union and Grievant also were concerned that he was terminated one day short of his probationary period. Lastly, the letter provides that A [i]t is noted that Mr. Hoogerwerf filed two Step 1 grievances with HPBA dated December 13, 1996 and April 15, 1997. It is of concern that the termination action may be tied into those grievances.@ A grievance of December 13, 1996 was introduced into evidence as UE 27 and the grievance of April 28, 1997 was introduced into evidence as UE 10. These grievances clearly place in issue the Employer=s Apersonal dislike@ for the Grievant as well as the Employer=s not wanting Grievant to obtain RIF rights. They also clearly fall within the larger issue as to whether the Employer properly exercised discretion to implement a reduction-in-force due to lack of funds in accordance with Article 9 of the Collective Bargaining Agreement.

In addition, Mr. James H. Takushi, in a letter to Ms. Nora Nomura, dated July 14, 1997, denying the Step 3 grievance, states in relevant part that A[d]uring the step three meeting, however, the Union alleged that the Grievant was terminated for reasons other than a lack of funds.@ (JE 5). This statement implies that reasons other than lack of funds, i.e. personal dislike for Grievant by the Employer, improper conduct by the Employer, and improper use of a RIF by the Employer were discussed at the Step 3 level. Accordingly, this Arbitrator finds that he has jurisdiction to act and that the issues discussed above as well as those set forth below in VI, Stipulated Issues, are arbitrable before this Arbitrator.

**VI. <u>Stipulated Issues</u>**. At the Pre-Arbitration hearing conference on January 29, 1998, the parties agreed and stipulated to several matters. These matters were memorialized in this Arbitrator=s Order to the parties on January 29, 1998. The Order was acknowledged by the parties on May 12, 1998, the first day of this arbitration hearing. (Tr.. 5/12/98 at 29 and 30). The Order provides in relevant part as follows:

1. All prior steps to the grievance process have been met or waived;

2. All issues set forth below are arbitrable before this Arbitrator;

3. The three issues before this arbitrator are as follows:

    a. Was the Grievant a non-regular employee or a regular employee at the time the action was taken by the Employer;

    b. Whether a non-regular employee has no reduction in force (ARIF@) notice and placement rights under Article 9 of the Unit 13 collective bargaining agreement; and

    c. Whether the Employer properly exercised discretion to implement the RIF due to lack of funds in accordance with Article 9 of the Unit 13 collective bargaining agreement.

4. The Grievant shall have the burden of proof concerning the above-referenced issues.

## A. WAS THE GRIEVANT A NON-REGULAR EMPLOYEE OR A REGULAR EMPLOYEE AT THE TIME THE ACTION WAS TAKEN BY THE EMPLOYER?

The Union alleged that the Arbitration Hearing that Grievant should be considered a regular employee. The Employer asserted that at the time the Employer decided to implement the RIF, the Grievant was on probationary status, and therefore was deemed as a non-regular employee.

Hawaii Administrative Rules (AHAR@) Section 14-1-15 specifically defines who a Aregular employee@ is. It provides in relevant part as follows:

> ARegular employee@ means an employee who has been appointed to a position in the civil service in accordance with chapter 76, Hawaii Revised Statutes, and who has successfully completed the employees initial probationary period, or as provided by statute.
>
> ANon-regular employee@ means an employee in a civil service position, not having regular status, including but not limited to those having emergency appointments, temporary appointments outside the list, provisional appointments, limited-term appointments and probational appointments.
>
> AProbationary period@ means a period of not less than 6 months and not more than one year which serves as the final test of an employee=s qualifications for the position in which employed. (underscoring provided).

In the present case, it appears that the Grievant was a non-regular employee when the RIF was implemented by the Employer on March 25, 1997. Based upon the Unit 13 Collective Bargaining Agreement and the RIF Guidelines dated July 31, 1995, the status of an employee for purposes of RIF has always been determined at the time the RIF notice was submitted by the Employer to either the Union, DHRD, or the employee. (Tr. 5/14/98, at 725-728). Mr. Norman Ohara, DHRD=s RIF specialist, testified that the employee=s status as a regular or non-

regular employee is determined as of the date of the RIF notice. (Tr. 5/14/98, at 740, 806-807). Mr. Norman Ohara further testified that in the previous 1995 RIF which impacted many, many more employees represented by the Union, the status of the employees was similarly determined by the date of the RIF notice. (Tr. 5/14/98, at 808-810). This same determination was applied to Grievant due the DHRD=s position that the RIF guidelines must be consistent. (Tr. 5/14/98, at 715).

The Grievant began serving his initial probationary period on November 1, 1996. Pursuant to HAR, Section 14-1-15, the Grievant could not have completed his probationary period until the end of the business day of April 30, 1997. As per the testimony of DHRD RIF specialist Mr. Norman Ohara, if Grievant was terminated on the close of the business day of April 30, 1998, Grievant would have obtained permanent status and RIF rights. (JE 2; TR. 514/98, at 752). As such, when the Employer submitted the RIF notice to the Union on March 25, 1997 (ER 1), the Grievant was on probationary status, thereby making him a non-regular employee at the time the Employer took action on the RIF.

**B. AS A NON-REGULAR EMPLOYEE, DOES GRIEVANT HAVE REDUCTION IN FORCE AND PLACEMENT RIGHTS UNDER ARTICLE 9 OF THE COLLECTIVE BARGAINING AGREEMENT?**

The Union alleged at the Arbitration Hearing that the Grievant should have been afforded RIF notice and placement rights. The Employer disagreed and asserted that the Grievant has no such rights.

Article 9 of the collective bargaining agreement concerning RIF notice requirements provides in relevant part as follows:

> When there is an impending reduction-in-force because of lack of work or funds, the appointing authority shall inform the respective Central Personnel Agency and the Union, in writing, as soon as possible but in any case at least ninety (90) calendar days before the impending reduction-in-force will take place. (JE 1, at 5) (underscoring added).

The RIF Guidelines dated July 31, 1995 (ARIF Guidelines@) were used during the 1995 Statewide RIF. (Tr. 5/14/98, at 895). The Union did not approve of all of the portions of the RIF guidelines (Tr. 5/14/98, at 895) but did not challenge their use in 1995. (Tr. 5/14/98, at 896). The RIF guidelines further clarifies the above provision by indicating as follows:

> BU 3 and 13 contracts do not require that their member employees be given 90 calendar days notice of the impending RIF. As a sound personnel practice, however, departments should inform their employees of the RIF as soon as possible. (JE 9, at 12).

The RIF Guidelines also state the following in regard to non-regular employees:

> Non regular employees are not entitled to the 90 notification period and may be terminated on or before the NTE date after the employees are given reasonable prior notice, e.g., two weeks. (JE 9, at 14).

Based upon the above provisions, since the Grievant is a Unit 13 employee, he was not entitled to any RIF notice rights. Although other collective bargaining agreements (i.e. BU 01, 02, 04, 09, 10) may require the Employer to notify the affected employee of an impending RIF at least 90 calendar days before the scheduled layoff, the Unit 13 collective bargaining agreement, particularly Article 9, does not specifically require that the Employer provide these employees with such RIF notice rights. Only the Department of Human Resources and Development (DHRD), as the Central Personnel Agency, and the Union are required under Article 9 to have at least 90 days notice of the impending RIF. In addition, the Grievant is also not afforded any RIF notice rights since he was a non-regular employee at the time the RIF was implemented. Thus, for the forgoing reasons, the Grievant is not entitled to RIF notice rights, whether he holds regular or non-regular status as an Unit 13 employee.

In regard to eligibility for RIF rights, Article 9 requires that A[t]he Employee is a regular Employee of the jurisdiction@ as a condition for placement rights. (JE 1, at 5). As noted

above, Grievant was not a regular employee at the time of his termination. As Mr. Norman Ohara, the RIF specialist for the employer testified, Aan initial probationary employee=s [sic] not entitled to RIF placement rights or RIF rights.@ (Tr. 5/14/98, at 713).

Grievant was without question a non-regular, probationary employee at the time the Employer decided to implement the RIF on March 25, 1997. Absent unreasonable, arbitrary, and capricious action by the Employer, Grievant was not entitled to RIF placement rights concerning issue 2 regarding non-regular employees.

It is significant to note that the first two issues set forth above were conceded by the Union at pages 45-46 of its closing brief, dated August 28, 1998. Still, the Union argued that the Employer=s use of a RIF was improper because there was no lack of funds and the Employer=s actions were unreasonable, arbitrary, and capricious.

## C. DID THE EMPLOYER PROPERLY EXERCISE ITS DISCRETION TO IMPLEMENT THE RIF DUE TO LACK OF FUNDS IN ACCORDANCE WITH ARTICLE 9 OF THE UNIT 13 COLLECTIVE BARGAINING AGREEMENT

In determining whether the Employer properly exercised its discretion to implement the RIF due to lack of funds in accordance with Article 9 of the Unit 13 collective bargaining agreement, the following three questions must be addressed.

1. Does the evidence show that there was a lack of funds?

Although the Employer maintained that it was under no obligation to show that it had a lack of funds to justify it=s reduction-in-force, information concerning a lack of funds was provided through the testimony of several witnesses. Still, the Employer lodged several relevancy objections during the arbitration hearing and argued that a reduction-in-force due to Alack of funds@

was a not negotiable item. This was also asserted in the Employer=s post-hearing brief. It appears to this Arbitrator that the standard for deciding whether an employer must provide information to a union in any particular situation varies depending upon the information that the union has requested.

In addition, the Apeculiar and unique factual pattern@ of the case may warrant disclosure of requested information. Lastly, a union has a presumptive right of access to employer information that bears directly on mandatory subjects of bargaining, such as wages, benefits, seniority, and other terms and conditions of employment of the members of the bargaining unit. See Whitin Machine Works, 108 NLRB 1537 (1954), enf=d 217 F2d 593 (4th Cir 1954), cert denied, 349 US 905 (1955).

On the other hand, information that relates to the economic health, operation, direction, and control of the employer, such as its financial records and projections, may be obtained by a union only if it can establish the specific relevance of the information to the relationship between the employer and the union acting in representative status. In other words, a union must demonstrate a particular need for financial information (i.e. a clear and direct nexus between the financial data and the negotiations). The union=s need for the information must go beyond a simple claim that such information would be helpful or useful in negotiations. See United Furniture Workers v. NLRB, 388 F2d 880 (4th Cir 1967).

If an employer claims that it does not have funds to meet obligations to a union, upon the union=s request the employer may be required to substantiate its claim by providing financial information to the union. See NLRB v. Truitt Mfg. Co., 351 US 149 (1956). Failure to disclose the requested information may also be a violation of the employer=s duty to bargain in good faith under sections 8(a)(5) and (1) of the National Labor Relations Act. Depending upon the circumstances, failure to provide information may also be a prohibited practice under Section 89-13 of the HRS.

Also see United Public Workers, AFSCME, Local 646, AFL-CIO, HLRB Decision No. 389 (1997) and State of Hawaii Police Officers, 3 HPERB 25 (1982).

In NLRB v. Truitt Mfg. Co., 351 US 149 (1956), the employer claimed in negotiations that it was undercapitalized, that it had never paid dividends, and that it could not afford to pay the 10 cents per hour wage increase demanded by the union. It further asserted that any increase greater than 2.5 cents per hour would force the company out of business. When the union asked to review the company=s financial statements to verify the claim, the company refused. The NLRB found an unfair labor practice and ordered the company to supply the union with such information as would substantiate the company=s position of its economic inability to pay the requested wage increase. The United States Supreme Court, agreeing with the NLRB, held that the company had an obligation to turn its books over to the union, reasoning that the duty to bargain in good faith may not be met when an employer mechanically repeats a claim of inability to pay without making the slightest effort to substantiate the claim. Also see NLRB v. Advertiser Mfg. Co., 823 F.2d 1086, 1090 (7th Cir. 1987) (finding that layoffs based on deteriorating economic conditions required bargaining); NLRB v. Carbonex Coal Co., 679 F.2d 200, 204 (10th Cir. 1982) (where the court found that even accepting Carbonex=s claim that the layoffs were economically motivated, the Company had a duty to bargain).

In applying the balancing test set forth in Decision No. 370, In Hawaii Government Employees Association, AFSCME Local 152, AFL-CIO, 5 HPERB 531, (1995), Appeal withdrawn May 8, 1996, DOE v. HGEA, et. al., Civil No. 95-4142-11 the scales clearly tip in Grievant=s favor in regard to whether a Alack of funds@ is a negotiable issue. In applying this balancing test, termination based upon a Alack of funds@ certainly affects Ahours@ and Aother terms and

conditions

of employment@ as a mandatory subject of bargaining. Using this balancing test, this Arbitrator finds that the termination of Grievant due to a Alack of funds@ is a mandatory subject of bargaining. The question which this Arbitrator must now answer under this balancing test is whether or not Section 89-9(d), HRS, often referred to as the management rights provision of Chapter 89, HRS, overrides this initial determination of negotiability and makes the subject non-negotiable. This Arbitrator finds that it does not override this initial determination of mandatory bargaining (balancing test tips in favor of Grievant) for the same reasons set forth in Section VI, C. 3, (Was the Employer=s use of the RIF a pretext for the termination of Grievant) at pages 43 through 45. The assertion of lack of funds is a negotiable issue under the circumstances of this case. For other cases where this balancing test is applied, see Hawaii Government Employees Association, AFSCME, Local 152 AFL-CIO, HLRB Decision No. 394 (July 16, 1988); United Public Workers, AFSCME, Local 646, AFL-CIO, HLRB Decision No. 389 (August 25, 1997) and Lingle v. United Public Workers, AFSCME, Local 646, AFL-CIO, HLRB Order No. 1333 (August 30, 1996).

The record indicates that from a least 1995, the State of Hawaii and it=s several departments and agencies have been struggling with the State budget. In fact, in 1995, the State implemented a statewide reduction in force. The budget problem continues and has not been resolved.

The Employer contends that due to legislative restrictions on its general funds budget, $158,382 of appropriated funds were required to remain unused to balance its budget by the end of the fiscal year, June 30, 1997. (Tr. 5/12/98, at 183; Tr. 5/13/98 at 363; ER 6). The Employer further asserts that in addition to other actions taken to offset this restriction, the Employer had no other alternative but to layoff an employee to completely satisfy the deficit amount. The Employer

further asserts that after much deliberation the Administrative Services Assistant, Position No. 28202, was identified and the Employer initiated the reduction-in-force (ARIF@) action in accordance with Article 9 of the Unit 13 Collective Bargaining Agreement. The Employer maintains

that the Grievant=s RIF was due to a lack of funds and in accordance with the provisions of the Unit

13 Collective Bargaining Agreement (Tr. 5/12/98 at 37).

Biennially, the Legislature appropriates general funds to State departments like the DCCA. (Tr. 5/12/98, at 190). Following the appropriations of budgets and based upon Council on Revenues projections, the Governor may impose restrictions on the appropriated budget. (Tr. 5/14/98, at 564). The Governor=s Office through the Department of Budget and Finance (AB&F@) issues instructions to departments as to the percentage of the departments= budget that is restricted. (appropriated funds that cannot be used) (Tr. 5/13/98, at 335; 5/14/98, at 563-64). In a supplemental budget year (an in-between year or second year of a biennium budget) the Legislature may also make reductions to the appropriated biennium budget. (Tr. 5/12/98, at 190; 5/13/99, at 335).

Historically, HPBA received sufficient general funds to handle both payroll and operational costs. (Tr. 5/12/98, at 135). Over the last six years, however, HPBA=s budget has been substantially reduced by 53%, specifically from $2.8 million to 1.3 million. (Tr. 5/12/98, at 135-137; 5/14/98, at 660).

HPBA, which operates as Hawaii Public Television, is administratively attached to the DCCA for purposes of funding and personnel administration. (Tr. 5/12/98, at 41 5/14/98, at 569). HPBA has two sources of funding for its operations: 1) general funds or general tax dollars which is obtained through DCCA=s departmental budget as appropriated by the Legislature, and 2)

revolving or special funds which are monies generated by HPBA through grants and donations. (Tr. 5/12/98, at 42; 5/14/98, at 561). The HPBA=s general funds budget covers the payroll of civil service and certain exempt employees (ER 5) and the revolving funds budget covers the payroll expenses of the remaining exempt temporary employees. (Tr. 5/12/98, at 137).

In 1995, HPBA lost 35 general and revolving fund positions through lay-offs and abolishment. (Tr. 5/12/98, at 133; 5/13/98, at 337; JE 7). In efforts to minimize a further RIF, HPBA transferred operational expenses (B costs) to its revolving funds budget to eliminate such expenses from general funds appropriations (Tr. 5/14/98, at 576, 654; ER 5, ER 10) and vacant funded positions were kept unfilled to offset legislative restrictions. (Tr. 5/14/98, at 656).

Over the span of a year before the implementation of the instant RIF in March 1997, Mr. Sheldon Robbs, HPBA=s General Manager, and Ms. Karen K. Yamamoto, HBPA=s Administrative Finance Manager, met to discuss how HPBA could completely satisfy its budget restrictions. (Tr. 5/12/98, at 235).

In the biennium budget covering FY 97 (1996 - 1997) and FY 98 (1997 - 1998), HBPA faced a legislative restriction of $158,382. (ER 5; Tr. 5/15/98, at 636). In particular, an August 12, 1996 Executive memorandum directed the HPBA to rectify the shortfall (ER 14) and, since a department may not exceed its appropriated budget, HPBA was compelled to immediately balance its budget. (Tr. 5/12/98, at 202; 5/14/98, at 658). Two vacant positions, Executive Producer/Director and Producer/Director, were unfilled in FY 97. The appropriated funding for these positions ($93,696) reduced the $158,382 restriction to $64,686. (ER 5, 5/12/98, at 199). However, to completely satisfy the budget restriction by end of FY 98, the Supervising TV Broadcast Engineer position ($32,532), which was vacant at the time, and the Administrative Services Assistant position ($32,644), which was held by Grievant at the time, was identified by

Employer for RIF due to lack of funds. (ER 5; Tr. 5/12/98, at 200).

Additionally, all state programs are assessed a turnover savings restriction of 3% of payroll costs. In FY 98, that was an additional $45,072 which HPBA was required to keep unused. (Tr. 5/13/98, at 341; ER 5). In anticipation of the state payroll lag, another $56,000 was also restricted. (ER 5).

The Union places substantial emphasis on (UE1) and (UE 2) to show that there was not a lack of funds at the time the grievant was terminated. This Arbitrator believes that Governor Cayetano and Co-Chairman of Senate Ways and Means Committee, Senator Carol Fukunaga, did in fact believe what they said, specifically, that there would be no more layoffs. However, more likely than not, they were not privy to the budget problems that HPBA had.

Undoubtedly, the HPBA had considerable problems with it=s budget. However, the fact that a funding problem exists does not mean that a RIF is necessary. For example, other operating costs can be cut rather than employee positions. Other vacant positions need not be filled. Some vacant positions may be identified for abolishment. In the Statewide 1995 RIF, the union was concerned that several thousand employees were targeted for a RIF. Evidently, Governor Cayetano meet with Union representatives to negotiate this problem with the Union in good faith. As a result thereof, only 9 employees were terminated by the RIF.

It is clear to this Arbitrator that the term Alack of funds@ is a relative term. If there is a lack funds, to what extent does it exist in the case before this Arbitrator? It is evident from the facts of this case that Alack of funds@ can mean different things to different people. For example, to the Employer, Alack of funds@ evidently means a Aprojected lack of funds@ while to the Grievant, lack of funds means lack of current funds. The Grievant maintains that a lack of funds did not exist

at the time the Grievant was terminated because his position was still funded through, at the very least, June 30, 1997. It appears from the evidence in this case that Grievant=s position is indeed funded through June 30, 1999. (ER 6). In addition, the Employer was filling two vacant positions at the time of Grievant=s termination.

Ohio Association of Public School Employees, 94-2 CCH ARB & 5635 (Oberdank, 1994), helps clarify this issue as to what constitutes a Alack of funds.@ In this particular case, the Employer was confronted with financial deficits that were expected to range anywhere from $78,416 in 1992 to $328,000 in 1993. Several budget hearings and special meeting of the Board of Education were held in an attempt to find a solution this problem. Three employees were informed that they were being laid off. All were told that they would be laid off because of the a financial shortfall in the 1993/94 school year. The union subsequently filed a grievance protesting the layoffs and argued that the layoffs were not brought about as a result of a lack of funds.

Arbitrator Oberdank noted that the collective bargaining agreement provided that employees in the school district could be Alaid off due to lack of funds, declining enrollment, lack of work or building closures.@ Arbitrator Oberdank stated at pages 5634 and 5635 as follows:

> The terminology is, in my opinion, clear and unequivocal and, when speaking about a lack of funds, means a lack of funds. The language does not refer to a projected lack of funds; an anticipated financial deficiency or a projected budget deficit but to a >lack of funds=... The employer, therefore, must show that it did not have sufficient funds with which to pay the employee before it is permitted to lay the individual off.
>
> The evidence in this case shows that there was an ending cash balance... [t]hus, funds were available and employees should not have been let go at that time... When the reduction in force is caused by a lack of funds, employees may be recalled whenever financial resources become available. Whether the layoff will be permanent or only temporary will depend upon the reason for the reduction-in-force.

> This Arbitrator, having considered the evidence, testimony, and post-hearing brief, finds that the Jefferson Area Local School District was not experiencing a Alack of funds@ in August, 1993 and that it violated Article 22, Section 22.4 of the collective bargaining agreement by laying off personnel at that time. The grievance is sustained and the District is directed to reinstate the laid off personnel with back pay for each month during which funds were available. The District need not pay employees for months when layoff would have been necessary because of a legitimate >lack of funds.= (underscoring provided).

It is significant to note that the employer had argued that the initiation of a reduction-in-force or hours was an inherent management right or prerogative, irrespective of any contract terminology. Arbitrator Oberdank rejected this argument and applied the above-referenced reasoning.

This Arbitrator finds Arbitrator Oberdank=s reasoning to be logical and hereby finds that there was no Alegitimate lack of funds@ since Grievant=s position was funded through at least June 30, 1997 and the Employer was seeking to fill at least two vacant positions within the HPBA, indicating that its lack of funds is based upon a projected budget shortfall, and is not based upon a current lack of funds.

It has been argued by the Employer that it has the authority to manage and direct it=s work forces. This Arbitrator agrees that this is the general rule. However, the fact that there is no legitimate Alack of funds@ is also evident from the unreasonable, arbitrary, and capricious action taken by the Employer at HPBA against the Grievant. The facts supporting this Arbitrator=s conclusion (Employer=s unreasonable, arbitrary, and capricious action) are the same facts set forth below in Section VI, C. 3, (Was the Employer=s use of the RIF a pretext for the termination of Grievant) at pages 49 through 51. Under the peculiar and unique factual pattern of this case, this Arbitrator cannot find that there is a legitimate lack of funds.

Article 5 of the Unit 13 Collective Bargaining Agreement and Section 89-9(d) of the HRS provides the Employer with management rights, which logically would include the right

to layoff employees. In addition, HRS, Section 89-9(d) provides for other Alegitimate reasons@ for terminating Grievant. However, no reason other than Alack of funds@ has been asserted by the Employer as a basis for terminating the Grievant. If there is any other legitimate reason, it is not before this Arbitrator.

In any event, assuming that there is a lack of funds, if an employee is not terminated for a lack of funds, but is terminated for some other improper reason, the termination must be set aside and the employee reinstated. This Arbitrator does not believe that Grievant was terminated due to a lack of funds, but rather believes that Grievant was terminated because of the Employer=s personal dislike for the Grievant. The facts supporting this Arbitrator=s conclusion (Employer=s unreasonable, arbitrary, and capricious action) are the same facts set forth below in Section VI, C. 3, (Was the Employer=s use of the RIF a pretext for the termination of Grievant) at pages 49 and 51.

2. What rights, if any, does a probationary employee have?

There is no intersubjective consensus among arbitrators as to the rights of probationary employees, if any. Where provisions of a collective bargaining agreement mentioned probationary employees but were unclear whether they were included in protection under a just cause clause, Arbitrator Samuel J. Nicholas, Jr., held that the Aweight of arbitral authority supports the proposition that management has broad, if not almost unlimited, discretion where probationary employees are concerned@. Bridgestone (U.S.A.), Inc., 88 LA 1314, 1316 (Nicho1as, 1987). Also see Veterans Administration Medical Center, 81 LA 325 (Gentile, 1983); Kaiser Engineers Hanford Company, 89-2 CCH ARB & 8393 (Lumbley, 1989); International Woodworkers of America, 92-2 CCH ARB & 8369 (Flagler, 1992). On the other hand, under a somewhat stricter limitation placed

by an arbitrator upon the right of management to discharge probationary employees, management=s action in doing so would Anot be set aside unless it was arbitrary, capricious, or discriminatory@; thus@ the question in such a case goes to the good faith of the Company, not the merits of its conclusion. Ex-Cell-O Corp., 21 LA 659,665 (Smith, 1953). This arbitrary, capricious, or discriminatory test has also been referred to as the Aunreasonable, arbitrary, and capricious test,@ see North American Aviation, Inc., 19 LA 565 (Komaroff, 1952); Standard Oil Company of California, 38 LA 361 (Ross, 1962); Pullman-Standard, 40 LA 757 (Sembower, 1963); San Jose Mercury News Guild, 48 LA 143 (Burns, 1966); Bergan Machine & Tool Co., Inc., 44 LA 301 (Buckwalter, 1965); Kaiser Aerospace & Electronics Corp., 67-2 CCH ARB & 8682 (Roberts, 1967); Giant Food, Inc., 77 LA 1277 (Seibel, 1981); Labor Management Services Administration, 80 LA 251 (Dworkin, 1983); School District of Rhinelander, 94-2 CCH ARB & 4355 (Imes, 1994). It has also been held that where, by the agreement, new employees are not to have seniority rights until completion of a probationary period, and where the agreement is otherwise silent as to management rights with respect to new employees, they may be discharged for any reason except discrimination. Joy Mfg. Co., 6 LA 430, 436 (Healy, 1946). In addition, where an agreement contained a Ajust cause@ requirement for discharge and made no reference to any probationary period for new employees, the requirement was applied fully to new employees. Osborn & Ulland, 68 LA 1146, 1150 (Beck, 1977). In another instance where an agreement was entirely silent as to management rights with respect to new employees, another arbitrator likewise would not read a probationary period into the agreement but nonetheless would give management wider latitude in determining just cause for discharge of new employees than allowed in case of employees who have served at least for a short period of time. Park Sherman Co., 2 LA 199, 200 (Lapp 1946).

The Unit 13 Collective Bargaining Agreement provides probationary employees with numerous rights. This Arbitrator finds in inconceivable and illogical that a Collective Bargaining Agreement would be interpreted to permit probationary employees to seek redress through the grievance procedure on claims concerning work rules, wages, terms and conditions of employment, reduction-in-force, etc. but be too restrictive and not allow a contractual arbitration grievance on the basis of an unreasonable, arbitrary and capricious termination.

This Arbitrator disagrees with the majority view taken by Arbitrator Samuel J. Nicholas. This Arbitrator agrees that Arbitrators should be most circumspect in reviewing management=s exercise of its authority and should not interfere with authority that has clearly been granted to an employer. However, logic and fairness dictate that the management for a public employer cannot exercise its rights in a totally uncontrolled fashion. Even without a contractual just cause principle, public employees are entitled to assurances that their public employer will not act against them unreasonably, arbitrarily, or capriciously. In other words, management may exercise its will as long as it does so with elementary reasonableness. That principle has particular application to cases involving termination of employment and appears to be the most logical test to apply to a public employer and a probationary employee, absent express contract provisions to the contrary.

Harmonious and cooperative relations would not be possible if a public employer acted in an unreasonable, arbitrary, and capricious manner towards its public employees. If public employees had no recourse against unreasonable, arbitrary and capricious action, this certainly would be contrary to the legislative history for Chapter 89 of the HRS.[10]

[10] The position taken by this Arbitrator is consistent with Chapter 89-1 of the HRS which provides that A[t]he legislature declares that it the public policy of the State to promote harmonious and cooperative relations between government and its employees and to protect the public by assuring effective and orderly operations of government.

The Unit 13 Collective Bargaining Agreement is silent as to the rights of a probationary employee. The agreement does not address under what circumstances a probationary employee may be terminated. However, given the legislative intent for the enactment of Act 171,[11] later to become the Chapter 89 of the Hawaii Revised Statutes, this Arbitrator finds that a public employer may terminate a public employee as long as the public employer uses elementary reasonableness. However, if a public employer acts unreasonably, arbitrarily, or capriciously in terminating the public employee, then the termination shall be set aside as a violation of the collective bargaining agreement.

3. Was the Employer=s use of the RIF a pretext for the termination of Grievant?

The Union alleges that the Employer=s decision to implement the RIF, which ultimately lead to termination of Grievant in his position as Administrative Services Assistant (Position No. 29752) was unreasonable, arbitrary and capricious. The employer disagrees, and asserts that it has the management prerogative under Section 89-9(d), HRS, to relieve or layoff certain employees due to lack of funds, and that it properly implemented the RIF when it followed the RIF procedures set forth under Article 9 of the Unit 13 agreement. The Employer further argues that it=s decision to RIF Grievant due to a Alack of funds@ is not negotiable. As noted above, several objections were lodged by the Employer on the basis of lack of relevancy since it was the

[11] Your Committee recognized that unresolved disputes in the public service are injurious to the public agencies and to public employees. This bill provides adequate means for preventing controversies between public agencies and public employees and for resolving them when they occur. Sen. Stand. Comm. Rep. No. 376-70, in 1970 Senate Journal, at 1179.

Employer=s position that a RIF on the basis of lack of funds was not negotiable. The Employer also made this argument in it=s post-hearing brief. Since so many objections were raised on this issue, this Arbitrator feels compelled to address these objections.

Collective bargaining in the State of Hawaii regarding public employment is governed by Chapter 89 (AChapter 89") of the Hawaii Revised Statutes (HRS@). Section 89-1, Statement of findings and policy provides as follows:

> The legislature finds that joint decision making is the modern way of administering government. Where public employees have been granted the right to share in the decision making process affecting wages and working conditions, they have become more responsive and better able to exchange ideas and information on operations with their administrators. Accordingly, government is made more effective. The legislature further finds that the enactment of positive legislation establishing guidelines for public employees is made more effective. The legislature further finds that the enactment of positive legislation establishing guidelines for public employment relations is the best way to harness and direct the energies of public employees eager to have a voice in determining their conditions of work, to provide a rational method for dealing with disputes and work stoppages, and to maintain a favorable political and social environment. The legislature declares that it the public policy of the State to promote harmonious and cooperative relations between government and its employees and to protect the public by assuring effective and orderly operations of government...(underscoring provided).

Act 171 (later to become Chapter 89 of the Hawaii Revised Statutes) became law in 1970. The legislature believed that Act 171 was necessary to promote the improvement of employee-employer relations within the various public agencies in the State of Hawaii by recognizing the right of public employees to join organizations of their own choice and to be represented by such organizations in their employment relations and public agencies. In addition, the

legislature recognized the importance of employee participation[12] in implementing employment

[12] Sen. Stand. Comm. Rep. No. 745-70, in 1970 Senate Journal, at 1333 provides as follows: Your Committee feels that the major implication of collective bargaining is effective and orderly operations of government. There are numerous ways to interpret how collective bargaining may promote effective and orderly operations of government, and among these are: (1) Public employers shall be required to take a more active role in the fulfillment of its responsibilities and functions. Only in few instances in the past have public employers spearheaded any major

policies and practices by providing as follows:

> Your Committee finds that the well-being of employees and efficient administration of public agencies are benefited by providing employees an opportunity to participate in the formulation and implementation of employment policies and practices affecting the conditions of their employment.

Sen. Stand. Comm. Rep. No. 376-70, in 1970 Senate Journal, at 1179. (underscoring provided).

In regard to the scope of negotiations between a public employee and a public employer, HRS, Section 89-9(a) provides in relevant part as follows:

> The employer and the exclusive representative shall meet at reasonable times, including meetings in advance of the employer=s budget-making process, and shall negotiate in good faith with respect to wages, hours...and other terms and conditions of employment which are subject to negotiation under this chapter and which are to be embodied in a written agreement, or any question arising thereunder, but such obligation does not compel either party to agree to a proposal or make a concession. (underscoring provided).

Emphasis is placed by this Arbitrator on the words A**good faith**.@

Section 89-9( c), HRS, further provides as follows:

> Except as otherwise provided herein, all matters affecting employee relations, including those that are, or may be, the subject of a regulation promulgated by the employer or any personnel director, are subject to consultation with the exclusive representatives of the employees concerned. The employer shall make every reasonable effort to consult with the exclusive representatives

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change in wages, hours, and other terms and conditions of employment. It is the responsibility of the employer not only to implement but also to establish, policies governing employer-employee relations. (2) Public employees shall become more responsive and shall be better able to exchange ideas and information on operations of government with their public employees. Joint decision making is the modern way of administering government and the best way to utilize the resources of both public employers and public employees to serve the public. (underscoring provided)

> prior to effecting changes in any major policy affecting employee relations. (underscoring provided).

HRS Section 89- 9(d) excludes from the bargaining process matters of inherent managerial policy. The relevant portions of this section are set forth below:

> (d) Excluded from the subjects of negotiations are matters of classification and reclassification... The employer and the exclusive representative shall not agree to any proposal which... would interfere with the rights of a public employer to (1) direct employees; (2) determine qualifications, standards for work, the nature and contents of examinations, hire, promote, transfer, assign, and retain employees in positions and suspend, demote, discharge, or take other disciplinary action against employees for proper cause; (3) relieve an employee from duties because of lack of work or other legitimate reason; (4) maintain efficiency of government operations; (5) determine methods, means, and personnel by which the employer=s operations are to be conducted; and take such actions as may be necessary to carry out the missions of the employer in cases of emergencies; provided that the employer and the exclusive representative may negotiate procedures governing the promotion and transfer of employees to positions within a bargaining unit, procedures governing the suspension, demotion, discharge or other disciplinary actions taken against employees, and procedures governing the layoff of employees; provided further that violations of the procedures so negotiated may be the subject of a grievance process agreed to by the employer and the exclusive representative. (underscoring provided).

Emphasis is placed by this Arbitrator on the words A**other legitimate reason**[13].@

[13]Section 89-13 of Chapter 89 recognizes bad faith dealing. This section covers several prohibited practices in which bad faith dealing is an issue. The Hawaii Labor Relations Board (ABoard@) has exclusive jurisdiction over such complaints. See HRS Sections 89-5, 89-13, and 89-14. Accordingly, any alleged violations of 89-13 falls within the exclusive jurisdiction of the Hawaii Labor Relations Board. Although the case currently before this Arbitrator does not involve any prohibited practice, emphasis is placed on the fact that Agood faith@ in the negotiation process is essential to the dealings between a Public Employer, a Union, and a Public Employee.

Although the legislature placed emphasis on public employee involvement, it also dictated that such involvement should not interfere with a public employers responsibilities and duties to the public. This is also evident from Sen. Stand. Comm. Rep. No. 745-70, in 1970 Senate Journal, which at 1332 provides as follows:

> (4) Scope of bargaining. Your Committee concurs that there is no reason to limit the scope of negotiations insofar as terms agreed to in the course of collective bargaining are consistent with the merit principles and the principle of equal pay for equal work and does not interfere with the rights of a public employer to carry outs its public responsibilities.

Also See Hse. Stand. Comm. Rep. No. 761-70, in 1970 House Journal, at 1170 and Hse Stand. Comm. Rep. No. 752-70, in 1970 House Journal, at 1165.

Thus, Section 89-9(d) of the Hawaii Revised Statutes qualifies this exclusion providing that the public employer and employee may negotiate procedures regarding layoffs.

Thus, whether a public employer must bargain with its employees or their representative ordinarily depends upon whether the matter affects wages, hours, and conditions of employment or involves the right of a public employer to carry out its responsibilities to the public. If the issue concerns the former, then the matter is clearly a mandatory subject of bargaining. If it involves the latter, then it does not.

Oftentimes, however, an issue affects wages, hours, and conditions of employment as well as the right of a public employer to carry out its responsibilities to the public. This is the situation in the case of Grievant. The decision to implement a layoff clearly concerns both wages, hours, working conditions as well as the right of a public employer to carry out its responsibilities to the public. In such a Ahybrid@ situation, the determination of whether or not the employer must collectively bargain can only be resolved by balancing the impact on working conditions against the burdens on the employer=s management rights. See Decision No. 84, Hawaii Government

Employees= Association, AFSCME, Local 152, AFL-CIO, 1 HPREB 762, 770 (1977).

The Hawaii Labor Relations Board (ABoard@) has explained how to apply this Abalancing test@ in Decision No. 370, In Hawaii Government Employees Association, AFSCME Local 152, AFL-CIO, 5 HPERB 531, (1995), Appeal withdrawn May 8, 1996, DOE v. HGEA, et al., Civil No. 95-4142-11. Board Chairman Bert M. Tomasu also explained the interrelationship of HRS, Sections 89-9(a) and (d):

> The Board has recognized that there are certain hybrid issues that involve policy making and have a direct impact on working conditions. See Decision No. 22, Hawaii State Teachers Association, 1 HPERB 253, 267 (1972) (the HSTA case). In the HSTA case, the Board held that the average class ratio is negotiable to the extent that it is a significant condition of employment; however, the Board held that the manner of implementing the reduction in average class size ratio involves a decision of inherent managerial policy and is not a proper subject of negotiation. Id. at 268.
>
> In explaining the interrelationship of Sections 89-9(a) and (d), the Board stated: [A]s joint-decision making is the expressed policy of the Legislature, it is our opinion that all matters affecting wages, hours, and conditions of employment, even those which may overlap with the employer rights as enumerated in Section 89-9 (d), are now shared rights up to the point where mutual determinations respecting such matter interfere with employer rights of necessity, cannot be relinquished because they are matters of policy Awhich are fundamental to the existence, direction and operation of the enterprise@West Hartford Educ. Assn. V. Decourcy, 80 LRRM 2422, 2429 (Conn. Sup. Ct. 1972). Id. At 266.
>
> In Decision No. 84, Hawaii Government Employees= Association, Local 152, AFL-CIO, 1 HPERB 762, 770 (1977) (the HGEA case), Board determined that there must be a conclusive showing of impact issue on the employment relationship to compel negotiation under 89-9(a), HRS. There, the Board adopted the National Labor Board=s interpretation of a similar provision of the National Act, which provides that A[a] mere remote, indirect, or not sufficient. In order for a matter to be subject to mandatory bargaining it must materially or significantly affect the terms of employment.@ Id. at 770-771.
>
> In the HGEA case, the Board applied the balancing test evolved under Section 89-9, HRS, in concluding that Section 89-9(d), HRS, rendered the

AFSCME, the of an Section Relations Labor Relations incidental impact is collective and conditions

> subject of employee parking non-negotiable. Id. at 771. The Board discussed Decision No. 26, Department of Education, 1 HPERB 311 (1973), in which the Board found that while the issue of teacher workload had a significant impact on working conditions, agreement on the issue would interfere substantially with the DOE=s right to determine the methods, means, and personnel by which it conducted its operations and would interfere with its responsibility to the public to maintain efficient operations. In addition, the Board cited the HSTA case, supra... While we held that Section 89-9(d) should not be narrowly construed so as to negate the purposes of bargaining, we concomitantly expressed the view that said section should not be liberally construed so as to divest the employer of its managerial rights and prevent it from fulfilling its duty to determine policy for the effective operation of the public school system. Id. at 771.
>
> In applying the balancing test, I initially find that the work schedule and hours of work of employees are a significant condition of employment. Section 89-9(a), HRS, specifically makes Ahours@ of employment a mandatory subject of bargaining.
>
> The question then becomes whether or not Section 89-9(d), HRS, the so-called Amanagement rights@ provision in Chapter 89, HRS, overrides the initial determination of negotiability and makes the subject non-negotiable.

Using this balancing test, Chairman Tomasu, at pages 541 and 542 of his decision, found that the impact of the seven-day public schedule on the terms and conditions of employment outweighed the employer=s rights under Section 89-9(d), HRS. Conversely, Chairman Tomasu found that the days and hours of library operations were an inherent management right and was non-

negotiable. The HGEA evidently conceded that the Employer had the authority to change library hours. Still, a Board majority found that the Employer was bound to consult and confer with the Union concerning these matters pursuant to Section 89-9(c), HRS.

Chairman Tomasu, at page 540 of his decision, stated that each case involving the balancing test must be judged on its Apeculiar and unique factual pattern.@ Chairman Tomasu cited Decision No. 62, Hawaii Government Employees Association, 1 HPERB 559 (1975) as providing as follows:

> These cases lend guidance insofar as the rationale employed. While it would be ideal if a clear-cut demarcation could be drawn between the employer=s rights and the employees= rights, the ideal cannot be transformed into reality since such rights are not mutually exclusive, but overlap. We must here again, as in prior cases involving the scope of bargaining, turn to the facts of the instant controversy and examine them in light of what the Legislature intended when it accorded public employees collective bargaining rights, while at the same time imposing certain limitations on the scope of bargaining under Sec. 89-9(d), HRS.

In University of Haw. Professional Ass=n v. Tomasu, 79 Haw. 154, 900 P.2nd 161 (1995), Chief Justice Ronald T. Y. Moon, in an unanimous decision, ruled that the obligation to bargain collectively forbids unilateral action by an employer with respect to pay rates, wages, hours of employment, or other conditions of employment even if the action was taken in good faith. The dispute involved the implementation of the Federal Drug-Free Workplace Act. The court found that to the extent the employer must comply with the federal law, it is not bargainable. However, since implementation of the federal law will affect bargainable topics, there was a duty to bargain. Chief Justice Moon relied considerably on Hawaii Labor Relations Board decisions and at pages 160 and 161 of the court=s decision stated as follows:

> C. The Terms of the Policy Statement Affect Bargainable Topics. [5,6] HRS, Section 89-9 sets out the scope of topics subject to mandatory bargaining. However, section 89-9 contains two subsections that, if read disjunctively, would either grant unlimited discretion to the managerial functions of the employer, see HRS, Section 89-9(d), or would allow management and employees to submit all aspects of work to the bargaining table. See Section 89-9(a). In In the Matter of the Hawaii State Teachers HRS Association and the Department of Education, Decision No. 22, 1 HPERB 251 (1972) [herein HSTA], the HLRB wrestled with this dilemma within the purview of the legislative intent underlying section 89-9. The HLRB noted that the legislature, through its AStatement of Findings and Policy,@ recognized joint decision making as leading to a more responsive workforce and a more effective government. HRS Section 89-1.
>
> In light of the legislative policy, the HLRB in HSTA noted: Section 89-9(a), (c ) and (d) must be considered in relationship to each other in determining

> the scope of bargaining. For if Section 89-9(a) were considered disjunctively, on the one hand, all matters affecting the terms and conditions of employment would be referred to the bargaining table, regardless of employer rights. On the other hand, Section 89-9(d), viewed in isolation, would preclude nearly every matter affecting terms and conditions of employment from the scope of bargaining. Surely, neither interpretation was intended by the Legislature.
>
> Bearing in mind that the Legislature intended Chapter 89 to be a positive piece of legislation establishing guidelines for joint-decision making over matters of wages, hours and working conditions, we are of the opinion that all matters affecting wages, hours and working conditions are negotiable and bargainable, subject only to the limitations set forth in Section 89-9(d).

Also see SHOPO v. Soc. of Professional Journalists, 83 Hawaii 378, 927 P.2d 386 (1996).

In the case currently before this Arbitrator, this balancing test clearly tips in favor of the Grievant, In applying this test, the layoff for Grievant due to a RIF is clearly a significant condition of employment. Section 89-9(a), HRS, specifically includes Ahours@ and Aother terms and conditions of employment@ as a mandatory subject of bargaining. In addition, Section 89-9(d), HRS, specifically refers to layoff procedures as arbitrable; consequently, at the very least, the procedures used to implement the layoff are arbitrable. Using this balancing test, this Arbitrator finds that the layoff of Grievant is a mandatory bargaining subject. The question which this Arbitrator must now answer is whether or not Section 89-9(d), HRS, often referred to as the Amanagement rights@ provision in Chapter 89, HRS, overrides this initial determination of negotiability and makes the subject non-negotiable.

Given the Apeculiar and unique factual pattern@ as set forth below concerning the termination of Grievant, this Arbitrator finds that the decision to layoff the Grievant by implementing a RIF due to a lack of funds is not overridden by the management rights provision and therefore does not become a matter that is non-negotiable. It remains subject to mandatory negotiations and the Employer is bound to consult and confer with the Union concerning these

matters pursuant to Section 89-9(c), HRS.

The Apeculiar and unique factual pattern@ of this case indicates that:

(1) The Employer failed to comply with the RIF guidelines set forth in Article 9 of the Unit 13 Collective Bargaining Agreement by giving the **Union** 90 days written notice **prior** to the implementation of the RIF. Written notice was given by letter dated March 25, 1997 and the RIF and termination date of Grievant occurred on April 29, 1997. This constitutes a violation of Article 4 of the Unit 13 Collective Bargaining Agreement.

(2) On April 24, 1996, five days before Grievant was terminated, HPBA was actively seeking to fill two positions, an assistant engineer position and a television broadcast engineer position. (Tr. 5/12/98, at 103).

(3) Grievant was terminated one day prior to becoming a regular employee. If Grievant had made regular status, he would have been entitled to RIF rights. (Tr. 5/13/98, at 489).

(4) Grievant was **not provided** with any performance appraisal evaluation reports. (Tr. 5/13/98, at 284).

(5) Grievant was the **only employee** terminated due to a reduction in force in the **entire DCCA in 1997**. (Tr. 5/13/98, at 387 and 487).

(6) Grievant=s immediate supervisor had a personal dislike for the Grievant and was the one who determined how to deal with the employer=s financial difficulties. (Tr. 5/13/98, at 378, 383).

(7) Grievant's immediate supervisor admitted to treating Grievant "like a child" in an e-mail to Grievant.

(8) Grievant's position was funded after Ms. Yamamoto categorized his position as Avery critical position@ to the HPBA and it was Aimperative@ that the position be filled Aas soon as possible."

(9) Grievant initiated a call to Mr. Patrick Chen as to the RIF process, clearly with the intent of using the RIF process to eliminate Grievant's position.

(10) The Union and the Grievant have asserted that a reduction in force was used as a pretext and that the true reasons for Grievant=s termination are disciplinary in nature.

Given the above, with emphasis on the fact that Grievant was the **only employee** to be terminated

due to a RIF in **the entire DCCA** in 1997 and held an "imperative and "very critical position" it appears that negotiations between the Union and the Grievant would not place an undue burden on the Employer. There is nothing in the record to indicate that by negotiating the RIF of one employee due to a lack of funds, there would be an undue burden on the Employer. However, the record indicates that there were several well- intended relevancy objections. The layoff of Grievant by enacting a RIF due to a lack of funds certainly was a proper subject for negotiations. Both the procedures used to implement the RIF and the actual decision to implement a RIF are mandatory bargaining subjects under the facts of this case.[14] For a more thorough discussion of the facts, please see Section III., Relevant Facts.

The Employer relies heavily on In Re Arbitration Decision and Award re: UPW v. State of Hawaii, at 7 (Paul S Aoki, January 15, 1997). Arbitrator Paul S. Aoki stated in his decision that:

> The testimony of Budget Director, Earl Anzai made it clear that there was a financial crisis that required the State to restrict spending substantially. The Union did not challenge Mr. Anzai=s testimony that there was such a crisis and presented **no evidence that there was any other reason** for the layoffs. Thus, the Arbitrator finds that the layoffs were due to a lack of funds. (Emphasis provided).

The words Aany other reason@ imply to this Arbitrator that Arbitrator Aoki=s decision may have

[14] It is significant to note that an exclusive bargaining unit, such as the Union is in a position to offer alternatives which may address or alleviate the economic conditions leading to employee layoffs. Such alternatives include waiver of various employee rights such as notice, (Tr. 5/14/98, at 855) restructuring the wage and benefit package of bargaining unit employees, foregoing wage increases or proposing plans such as collectively absorbing a loss in lieu of a layoff or exploring options for early retirement or voluntary leave in order to avoid a layoff or limit the scope of a layoff.

been different if the Union had alleged that there was Asome other reason@ for the layoffs.

Arbitrator Aoki was faced with a completely different set of facts when compared to the facts before this Arbitrator. Pre-arbitration negotiations indicated that several thousand employees were originally at risk of being terminated due to a lack of funds. When the case was eventually brought before Arbitrator Aoki, nine (9) state workers rather than thousands were terminated. In the case currently before this Arbitrator, pre-arbitration negotiations indicated that only one employee faced termination due to a reduction-in-force. When the case was eventually brought before this Arbitrator, this employee was the terminated due to the reduction-in-force. He was also the only employee in the DCCA to be subjected to a reduction-in-force in 1997. In addition, Arbitrator Aoki was not faced with a supervisor (Budget Director Earl Anzai) who had an AAx to grind@ with the employees that were being laid off. In the case before this Arbitrator, the Employer, through Ms. Karen K. Yamamoto (Grievant=s immediate supervisor, Tr. 5/12/98, at 279), had a personal dislike for the Grievant. Lastly, the Union in Mr. Aoki=s case did not assert that there was another motive other than lack of funds for the layoffs. In the case before this Arbitrator, the Union has asserted that the Employer improperly used the RIF as a tool to terminate the Grievant.

The very essence of a RIF based upon a Alack of funds@ gives the public employer a tremendous management right. Principles of fairness and equity can be usurped if those in management improperly use a RIF. For example, an employee subject to disciplinary action could be dismissed without a showing of Aproper cause@ as required by Article 8 (regarding discipline) of the Unit 13 Collective Bargaining Agreement. In addition, persons who are disliked by management could be summarily discharged by improper use of a RIF. Simply put, a RIF allows

a public employer to terminate employees upon an assertion that there is a Alack of funds.@ In addition, as noted above, Alack of funds@ is an ambiguous term and can be used in a variety of interpretations given the same set of facts.

When a governor or other high ranking public official calls for a statewide RIF due to lack of funds, most people would assume that there is a lack of funds. The governor or other high ranking public official does so at his peril and takes substantial political risks (i.e. loss of votes, loss of supporters, loss of constituents, and loss of political campaign donations) in laying off employees. When a small agency within the state such as the HPBA initiates a RIF within the Department of the DCCA, it also is generally assumed that the department is taking such drastic action only because it is for Alack of funds.@ Public employees realize that if the public employer must take drastic action by implementing a RIF, they could very well be the person identified for the RIF.

On the other hand, if an employee within the department alleges that he is being targeted by a pretextual RIF, an Arbitrator would be remise in his duties if he did not analysis the testimony and evidence presented at a hearing on this issue.[15] This Arbitrator believes that if he refused to hear evidence of a pretext and simply concluded that because the public employer has implemented a RIF due to a lack of funds, the matter is not arbitrable, case closed, he is doing injustice to the public employer, the employee, and the people of the state.

The Union implies in it=s closing brief that there was a conspiracy within DCCA,

[15] See First Nat=l Maint. Corp. v. NLRB, 452 U.S. 666, 682 (1981) holding an employer may not mask its desire to weaken a union by labeling its decision to shut down part of its business as Apurely economic@. Using this same logic, an employer may not unreasonably, arbitrarily, and capriciously terminate an employee by labeling its decision as one based upon a Alack of funds@.

DHRD, and HPBA to not only terminate Grievant, but to deny him RIF benefits and placement rights. It is significant to note there is nothing in the record to indicate that there was a conspiracy outside of HPBA to use the RIF process to terminate Grievant. Rather, the facts indicate that there was no such conspiracy or concerted action. For example, in regard to the interpretation of the RIF guidelines (Joint Exhibit 1) Mr. Patrick Chen of the DCCA had originally believed that Grievant was entitled to RIF rights and benefits. (Tr. 5/13/98, at 441). However, Mr. Norman Ohara at DHRD believed that Grievant was not entitled to RIF rights and benefits. (Tr. 5/13/98, at 461-462) Mr. Chen later deferred to Mr. Ohara and the DHRD position. (Tr. 5/13/98, at 490-491; Tr. 5/14/98, at 864-865).

This lack of concerted action on the part of DCCA and DHRD is also evident from the testimony of Union representative Ms. Nora Nomura. In regard to the issue of waiver of notice, Mr. Patrick Chen of the DCCA referred Ms. Nomura to DHRD because the he believed that DHRD would be the department that would approve the waiver. DHRD is evidently the department responsible for RIF situations and matters pertaining thereto. When Ms. Nomura called DHRD, she was informed by Mr. Norman Ohara to call DCCA as it would be DCCA=s call. As per Mr. Ohara, DHRD advised DCCA that in deciding on what type of action to take in regard to Grievant, it was necessary for DCCA to consider it=s budget needs. Mr. Ohara evidently believed that the waiver decision was up to DCCA because DCCA was not instructed by DHRD to terminate Grievant. DCCA was clearly instructed to consider it=s budget needs in deciding whether or not to terminate Grievant. There was considerable conflicting testimony among the Employer=s witnesses that indicates that they failed to keep in contact with each other to determine exactly what rights, if any, Grievant was entitled to. (Tr. 5/14/98, at 855-856).

The record appears to indicate that the DCCA appeared to be very concerned with correcting it=s financial shortfall. (Tr. 5/14/98, at 608-609). On the other hand, DHRD appeared to be more concerned with consistently applying the RIF procedures. (Tr. 5/14/98, at 715). Both departments were involved in the termination of Grievant, but both had different agendas. Both were evidently unaware of the extent and degree to which Grievant had been humiliated by his immediate supervisor, Ms. Karen K. Yamamoto.

There is nothing in the record to indicate that any of the Employer=s witnesses, with the exception of Mr. Sheldon Robbs and Ms. Karen K. Yamamoto, would have been aware of the true reasons for Grievant=s termination. When Ms. Kathryn S. Matayoshi (and her subordinate Mr. Patrick Chen) terminated Grievant due to a lack of funds, she evidently thought it was a legitimate RIF. Likewise, when Mr. James H. Takushi (and his subordinate Mr. Norman Ohara) upheld the termination of the Grievant due to lack of funds, he also believed that he was implementing a legitimate RIF. The various correspondence to Grievant by DCCA and DHRD and well as correspondence between DCCA and DHRD indicates that they acted in good faith while pursuing their respective agendas. As noted above, DCCA evidently wanted to correct its shortfall as soon as possible, while DHRD wanted to make certain that the RIF guidelines were consistently applied.

The decision to terminate Grievant due to a RIF for lack of funds was made by Mr. Sheldon Robbs (Tr. 5/12/98, at 72-74) and Ms. Karen K. Yamamoto. (Tr. 5/12/98, at 233). Ms. Yamamoto is also the one that called Mr. Patrick Chen for information on how to use the RIF. Still, Mr. Robbs knew there was a serious  personality conflict between Ms. Yamamoto and Grievant. Mr. Robbs also knew that the clash between Grievant and Ms.Yamamoto was so serious that he had to lecture them both in his office. He did not consider the conduct of either of them professional.

(Tr. 5/12/98, at 129). Given this, when it came to deciding on how to handle the budget crisis at HPBA, it certainly was unwise of Mr. Robbs to permit Ms. Yamamoto to unilaterally decide how to make up the shortfall. Someone other than Ms. Yamamoto should have been used to determine how the shortfall would be dealt with. By closing his eyes and permitting Ms. Yamamoto to make the decision, Mr. Robbs quietly endorsed her actions.

The Union has presented substantial evidence to substantiate it=s claim that the Employer acted in an Aunreasonable, arbitrary, and capricious@ manner by using a RIF to terminate the Grievant. The record clearly indicates that Ms. Karen K. Yamamoto treated Grievant Alike a child.@ Although Ms. Yamamoto apologized for her behavior, she apparently continued to demean her subordinate, the Grievant, by sending him various E-mail publications. The E-mail that was sent was evidently accessible to anyone who wanted to review it at HPBA. E-mail that the HPBA evidently is not secure and therefore not confidential. Ms. Yamamoto should have used some other means of communication, particularly when she suspected that an employee at HPBA may have been reading other people=s E-mail. Ms. Yamamoto also routinely had Grievant act as a receptionist, omitted him from board meetings, and left him out of decisions concerning his staff and student aides. Ms. Yamamoto also failed to complete and send, to Mr. Patrick Chen, performance evaluations of the Grievant. Despite the fact that Grievant held a Acritical position@ essential to the Amoral of HPBA=s staff,@ words selected by Ms. Yamamoto herself to describe Grievant=s position, Ms. Yamamoto identified Grievant=s position for a RIF. This Acritical@ position was held by Grievant for less than 6 months prior to Ms. Yamamoto=s RIF decision, but only approximately 5 weeks after Ms. Yamamoto apologized to Grievant for treating him like a Achild@ and only approximately 6 weeks after questioning his supervisory skills and informing him

that she may be a recipient of his Abull-shit.@ Mr. Sheldon Robbs apparently did little to make certain that the rights of Grievant were protected. He allowed Ms. Yamamoto to unilaterally decide on how to handle HBPA=s budget problem. The result, not surprisingly, was a RIF and subsequent termination of Grievant. Grievant was **the only** employee within the HPBA to be terminated in 1997. Given the above-cited facts, this Arbitrator finds that Grievant=s termination was pretextual and that use a RIF due to a lack of funds (current or projected) was an improper termination of Grievant. The use of a RIF under these circumstances constitutes unreasonable, arbitrary, and capricious action by Grievant=s Employer, supervisor, Ms. Yamamoto and HPBA Director, Mr. Robbs.

Accordingly, this Arbitrator finds that the Employer improperly implemented a reduction-in-force pursuant due to lack of funds under Article with Article 9 of the Unit 13 Collective Bargaining Agreement. Furthermore, this Arbitrator finds that Articles 3 and 4 of the Unit 13 bargaining agreement have been violated by the Employer.

**VII. <u>AWARD</u>**: There was no testimony that Grievant=s work performance was unsatisfactory. To the contrary, the testimony of Mr. Patrick Chen established that if no performance appraisal was completed for Grievant, Grievant=s work was presumed to be satisfactory. (Tr. 5/14/98, at 707-708). Given this as well as the matters set forth **in pages 44-45** above (pretextual RIF), and the fact that Grievant would have made regular status on April 30, 1998 (one day before his termination due to a pretextual RIF), Grievant is deemed to have satisfactorily passed his probationary period. The termination action is rescinded and Grievant is reinstated as of April 30, 1997, with all back pay and benefits of contract and law that would make him whole. [16]

[16] Assuming arguendo that it **<u>was proven</u>** that the Grievant was failing to meet performance expectations, failing to comply with work directives, exhibited behavior that was detrimental to the work environment of HPBA, legitimate grounds to terminate Grievant prior to his

This Arbitrator will retain jurisdiction for the limited purpose of compliance with this Arbitrator=s award.

DATED: Honolulu, Hawaii, October 7, 1998.

/S/_____
MICHAEL ANTHONY MARR
Arbitrator

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probationary period ending would most certainly have existed. However, such proof was never offered. The Employer's only evidence offered to discharge Grievant was due to a RIF. The Employer's right to use a Reduction-In-Force is generally presumed to be valid. Is a very powerful Employer tool and must be used in strict compliance with the Collective Bargaining Agreement. Creating a RIF for the sole purpose of discharging an employee is a misuse of the RIF and constitutes arbitrary, capricious and discriminatory action by the Employer. A RIF cannot be used as a pretext to terminate an Employee that the Employer dislikes.